

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-220869

DATE: April 30, 1986

MATTER OF: Uniformed Services University of the
Health Sciences -- Application of Pay Caps
to Faculty Members

DIGEST:

Civilian faculty members of the Uniformed Services University of the Health Sciences question whether their pay is subject to statutory pay caps imposed on federal salaries for fiscal years 1979-1981. Although the salaries of these faculty members are set by the Secretary of Defense under 10 U.S.C. § 2113(f) to be comparable with other medical schools in the vicinity of the District of Columbia, we hold these salaries are subject to the statutory pay caps imposed by Congress for fiscal years 1979 and 1981. Pay increases for these positions were also limited by administrative determination for fiscal year 1980 to be comparable with other Federal executive pay increases. A recent court decision involving backpay for Senior Executive Service employees is not applicable to these faculty members.

ISSUE

The issue in this decision is whether statutory limitations on pay increases apply to the salaries of civilian faculty members of the Uniformed Services University of the Health Sciences. We hold that the salaries of the civilian faculty members were properly capped in fiscal years 1979-1981 and that they are not affected by a recent court decision awarding backpay to members of the Senior Executive Service.

BACKGROUND

This decision is in response to a request from the General Counsel of the Department of Defense (DOD) for an advance decision concerning the application of certain

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statutory pay caps to civilian faculty members of the Uniformed Services University of the Health Sciences (USUHS). The question arose in connection with an inquiry by a faculty member as to the possible application of the decision in Squillacote v. United States^{1/} involving backpay to Senior Executive Service employees whose pay was capped under statutory pay limitations in fiscal years 1979, 1980, 1981, and 1982.

The USUHS employs both military and civilian professors, instructors, and administrative staff. Under the provisions of 10 U.S.C. § 2113(f) (1982), the civilian members of the faculty and staff receive salary rates and retirement and other benefits prescribed by the Secretary of Defense which shall be comparable "with the employees of fully accredited schools of the health professions within the vicinity of the District of Columbia." However, since 1978 the Department of Defense has limited pay increases to these faculty members based on pay caps applicable to salaries paid at rates equal to or in excess of the rate for level V of the Executive Schedule.

The request from DOD sets forth two opposing arguments: (1) that the salaries of the USUHS faculty members are capped by the statutory pay limitations; and (2) that these salaries are not limited under the pay freeze legislation and the faculty members are entitled to backpay. In addition, we requested and received comments on this matter from the Office of Personnel Management (OPM), and those comments are set forth below.

^{1/} 562 F. Supp. 338 (E.D. Wis. 1983), aff'd in part and rev'd in part, 739 F.2d 1208 (7th Cir. 1984), reh'g denied, 747 F.2d 432 (7th Cir. 1984), cert. denied, 105 S. Ct. 2021 (1985).

Argument against pay cap

The DOD argument against application of the pay caps is that the salaries of civilian faculty members of USUHS are to be fixed on a comparable basis with other faculty members in schools of the health professions in the vicinity of the District of Columbia as prescribed by statute, and application of a pay cap would make it impossible to follow this legislative mandate. In addition, DOD argues that the USUHS salary rates are not fixed at or limited to rates equal to or greater than rates payable for level V of the Executive Schedule as prescribed in the applicable pay legislation, and, thus, the faculty salaries are not subject to that legislation. Finally, DOD argues that the specific statutory provision for fixing USUHS faculty salaries takes precedence over general legislation imposing a pay cap on federal salaries.

Argument in favor of pay cap

The DOD argument in favor of applying the pay caps cites the legislative history to the fiscal year 1979 pay cap as intending a pay cap for all persons employed by the Federal Government whose salaries were equal to or greater than the rate for level V of the Executive Schedule. In addition, we note that the DOD has applied this and other pay caps to the salaries of the USUHS faculty since late 1978.

OPM Comments

In response to our request for comments, the Deputy General Counsel of OPM states that the Squillacote decision applies only to the Senior Executive Service (SES) and does not extend to other employees under SES-type pay systems. The comments from OPM also state that since the pay system of the USUHS faculty members is outside of OPM's purview, OPM cannot comment further as to any backpay entitlement.

OPINION

As noted above, the statutory authority for fixing the salaries of USUHS faculty members is contained in 10 U.S.C. § 2113(f) (1982). There is nothing contained in the legislative history of section 2113(f) to indicate whether the Congress intended that these civilian faculty members receive salaries and other benefits without regard to the limitations imposed on other federal executives and employees. We note, however, that the USUHS may obtain the services of military professors, but there is no specific authority to compensate such military officers in any manner different than that provided under 37 U.S.C. §§ 201-209 and 302-303a (1982).

The pay cap first cited by the DOD was a general limitation on salary increases for fiscal year 1979 contained in section 304(a) of Public Law 95-391, 92 Stat. 788-789, September 30, 1978, which provides as follows:

"No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or judicial branch, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for September 30, 1978, if the rate of salary or basic pay for such office or position is--

"(1) fixed at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule under section 5316 of title 5, United States Code, or

"(2) limited to a maximum rate which is equal to or greater than the rate of basic pay for such level V (or to a percentage of such a maximum rate) by reason of section 5308 of title 5, United States Code, or any other provision of law or congressional resolution."

We believe section 304(a) by its very terms applies to the civilian faculty positions at the USUHS. First, the pay cap is imposed on funds appropriated under that Act or any other act for the fiscal year. Second, the pay cap refers to the salary or pay of any individual in any office or position in the legislative, executive, or judicial branch of Government, and the USUHS, established under the Department of Defense, is clearly part of the executive branch. For these two reasons, we disagree with the DOD argument that the specific statutory authority for fixing USUHS faculty salaries takes precedence over general legislation imposing a pay cap on federal salaries.

Next, DOD argues the pay cap is not applicable since the faculty salary rates are not fixed at or limited to rates equal to or greater than level V of the Executive Schedule. However, the pay cap refers to a rate of salary which is fixed at a rate equal to or greater than level V of the Executive Schedule or limited to a maximum rate which is equal to or greater than level V. Thus, we disagree with the DOD argument on this point since it is the rate of salary for each position which is determinative of whether the pay cap will apply, not whether the pay scales have been fixed at rates equal to or greater than level V of the Executive Schedule.

Finally, the DOD argues that application of the pay cap would make it impossible to follow the statutory requirement to fix salaries on a comparable basis to salaries of certain faculty members in the health professions. However, this factor is not sufficient to overcome the plain language of the pay cap legislation cited above.

The language of the pay cap for fiscal year 1981 is comparable to the language for fiscal year 1979.^{2/} We hold that this pay cap applies to the USUHS positions for the same reasons cited above in the discussion of the fiscal year 1979 pay cap.

Although the language of the pay cap for fiscal year 1980 is different than the pay caps in other years cited above, we believe the salaries of these faculty members were properly capped for that year as well, for the reasons that follow. By its terms, the pay cap for fiscal year 1980 refers to executive employees whose pay would have increased by 12.9 percent but who, because of the pay cap, were not to receive more than a 5.5 percent increase. Public Law 96-86, § 101(c), October 12, 1979, 93 Stat. 657. As noted by the Court of Appeals in Squillacote, cited above, the pay cap for fiscal year 1980 refers to pay set under the Federal Pay Comparability Act of 1970, 5 U.S.C. §§ 5301-5308, or the Executive Salary Cost-of-Living Adjustment Act, 5 U.S.C. § 5318. Since the pay of the USUHS civilian faculty members is set by the Secretary of Defense and not under these two statutory authorities, the pay cap for fiscal year 1980 does not specifically apply to these faculty positions.

We note, however, that for fiscal year 1980, the Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics, by memorandum dated November 6, 1979, approved the salary schedules for USUHS faculty and staff

^{2/} See Public Law 96-369, § 101(c), October 1, 1980, 94 Stat. 1352; Public Law 96-536, § 101(c), December 16, 1980, 94 Stat. 3167; Public Law 97-12, § 401, June 5, 1981, 95 Stat. 95, cited in the note to 5 U.S.C. § 5318 (1982).

members, but limited the increase called for by these schedules to 5.5 percent for positions whose salary was equal to or greater than \$47,500 "in order to achieve equitable treatment of all federal executive employees." We conclude that it was within the discretion accorded to the Secretary of Defense (or his designee) by 10 U.S.C. § 2113(f) to set the pay of these faculty members and to limit the pay increases of these faculty members for fiscal year 1980. See, for example, Bureau of Engraving and Printing, B-211956, October 21, 1983. Therefore, we conclude that the salaries of these faculty members were properly capped during fiscal years 1979, 1980, and 1981.

Finally, we are not persuaded that the Squillacote decision has any application to the salaries of the civilian faculty positions at the USUHS. In Squillacote v. United States the Court of Appeals ruled that SES members were subject to the fiscal year 1979 pay cap contained in section 304(a) of Public Law 95-391 and were thus limited to salary rates based on a maximum rate for level V of the Executive Schedule instead of level IV.^{3/} However, the Court of Appeals ruled that SES members were not described in the applicable pay cap contained in section 101(c) of Public Law 96-86 for fiscal year 1980 and, therefore, were not capped at level V of the Executive Schedule.^{4/} The court's decision means that the salaries of the SES members for fiscal year 1980 were only subject to the level IV limitation on SES pay contained in 5 U.S.C. § 5382(b).

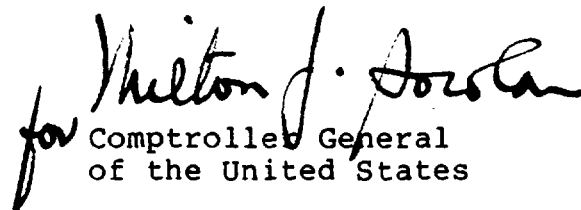
^{3/} 739 F.2d 1208, at 1211-1215.

^{4/} Id.

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As noted in the comments from OPM, the court's decision in Squillacote applied only to the Senior Executive Service in the Executive Branch under 5 U.S.C. §§ 3131-3136 (1982), and we believe the court's decision has no general application to positions outside of the SES or positions whose salaries have no relation to the SES. The court in Squillacote did not overturn the pay cap generally; rather, the court held that SES members were not specifically covered by the level V pay cap and the cap imposed on executive level salaries. Therefore, we decline to apply either the holding or the rationale of the Squillacote decision to positions outside of the SES such as civilian faculty members of the USUHS.

Accordingly, we conclude that the salaries of the civilian faculty members of the USUHS were subject to the statutory pay caps imposed by Congress for fiscal years 1979 and 1981, and to the administratively imposed pay cap for fiscal year 1980.

for 
Comptroller General
of the United States